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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

GEORGE DENTON GARDNER et al., Plaintiffs and Respondents, v. YUCAIPA TRADING CO., INC. et al., Defendants and Appellants.	E069879 (Super.Ct.No. CIVDS1708917) OPINION

APPEAL from the Superior Court of San Bernardino County. Keith D. Davis, Judge. Reversed.

Snell & Wilmer, Todd E. Lundell, Brian J. Mills and Erin Leach for Defendants and Appellants.

Bononi Law Group, William S. Waldo and Kevin D. Cardona for Plaintiffs and Respondents.

In a first amended complaint (FAC), plaintiffs and respondents George D. Gardner (Gardner) and Kimberly B. Mederos (Mederos) sued defendants and appellants Yucaipa Trading Co., Inc. (Yucaipa); Glen Avon Food, Inc.; Nobel Farm Market, Inc.;

RRM Holdings, LLC (RRM); and RRM Acquisitions, LLC. Gardner and Mederos (collectively, Employees) brought 10 causes of action: (1) breach of contract; (2) breach of senior subordinated debenture; (3) violation of Business and Professions Code section 16600; (4) violation of Business and Professions Code section 17200; (5) unlawfully forcing an employee to agree to illegal terms of employment (Labor Code, § 432.5); (6) failing to pay minimum wage (Labor Code, § 1197.1); (7) failing to pay wages and overtime (Labor Code, §§ 510, 558); (8) failing to pay wages at termination (Labor Code, §§ 201, 203); (9) failing to furnish accurate wage statements (Labor Code, §226, subds. (a)&(e)); and (10) penalties under the California Private Attorneys General Act (Labor Code, §§ 2698 et seq.).

Defendants petitioned to compel arbitration. (Code Civ. Proc., § 1281.2.) The trial court denied defendants' petition to compel arbitration. The trial court found the arbitration provisions in the employment contracts were procedurally and substantively unconscionable and therefore refused to enforce the arbitration provisions.

Defendants contend the trial court erred because (1) the employment contracts are not procedurally unconscionable; (2) the employment contracts are not substantively unconscionable; and (3) the trial court should have severed any unconscionable provision. We reverse the order.

FACTUAL AND PROCEDURAL HISTORY

A. FAC

The facts in this subsection are taken from the FAC. On June 4, 2015, Gardner became the Chief Executive Officer (CEO) of Yucaipa. Yucaipa and Gardner signed an

executive employment agreement that contained the terms of Gardner's employment (Gardener's Contract). Per the terms of Gardner's Contract, in addition to being CEO of Yucaipa, Gardner was appointed to serve as CEO of Yucaipa's parent company RRM. Gardner's base salary was $270,000.

On June 4, 2015, Mederos became the "Senior Vice President Marketing and Center Store of Yucaipa." Yucaipa and Mederos signed an executive employment agreement that contained the terms of Mederos's employment (Mederos's Contract). Per the terms of Mederos's Contract, in addition to working for Yucaipa, she was "appointed to serve in the same or comparable position with Yucaipa's parent, RRM." Mederos's base salary was $190,000.

Employees were hired "to run Rio Ranch Markets (Rio Ranch), a six (6) store chain of food stores catering to Hispanic customers. Effective as of June 4, 2015, RRM . . . purchased Rio Ranch from its then owners." "[I]n the approximately twelve (12) months while the purchase [of Rio Ranch] was being negotiated, the financial condition of Rio Ranch deteriorated, especially in the last six (6) months before the transaction closed."

"Once the store resets and Grand Re-openings got underway, sales declines tapered off and sales showed an improved growth rate in the fourth quarter of 2016. The customer count/transaction count decline was also halted. Basket size increased. The sales growth occurred in spite of price reductions. Unit sales showed significantly greater growth." "The bottom line was that by the beginning of the fourth quarter of 2017, the sales direction was positive."

On March 28, 2017, Yucaipa and RRM terminated Gardner's and Mederos's employment. Termination letters given to Gardner and Mederos reflected they were being terminated for good cause, but no facts were provided as to what constituted the good cause for termination.

Employees' first cause of action, for breach of contract, alleges Yucaipa breached Gardner's Contract and Mederos's Contract (collectively, the two contracts) because there was not good cause to terminate their employment. In their prayer for relief, Employees sought general, special, and punitive damages. They also sought declaratory and injunctive relief.

The two contracts were attached to the FAC. The two contracts included the following provision, enumerated as Section 18: "The parties intend to negotiate in good faith and resolve any dispute arising under this Agreement. In the event the parties are unable to resolve their dispute informally, any controversy or claim arising out of or relating to this Agreement, including, without limitation, the interpretation or breach thereof, either party may submit the dispute to binding arbitration by a sole arbitrator to be administered by JAMS pursuant to its Expedited Arbitration Procedures, and judgment upon the award rendered by the arbitrator may be entered in any court having jurisdiction thereof. Such arbitration shall be conducted in the County of Orange, California. Each of the parties hereto irrevocably and unconditionally consents to the exclusive jurisdiction of JAMS to any dispute, claim, or controversy arising out of or relating to this Agreement. The written decision shall be final, binding, and convertible to a court judgment in any appropriate jurisdiction. Notwithstanding the foregoing, this

provision shall not preclude either party from seeking temporary, provisional, or injunctive relief from any court as provided in this Agreement. All arbitrator fees and expenses in connection with the arbitration will be borne by the Company."

The two contracts also included the following provision in Section 8 of the contracts: "The Executive shall be subject to the non-competition restrictive covenant set forth in the Executive's RRM Holdings, LLC Class C Incentive Unit Agreement."

The incentive unit agreements for Gardner and Mederos provided, "So long as the Member is a Member of the Company and until the earlier of (a) twelve (12) months after the full and complete repurchase of Member's vested Class C Units pursuant to the terms of this Agreement, or (b) twelve (12) months after the termination of Member's employment with the Company . . . the Member . . . will not, (a) directly or indirectly, engage in, or have any interest in any other Person, whether as a debt or equity holder, employee, officer, director, member, manager, partner, agent, security holder, or consultant, which engages or plans to engage in a Competitive Hispanic Business anywhere in the Counties of Riverside, San Bernardino, Orange, San Diego, Imperial, or Los Angeles in the State of California or in any other county in which the Company or its subsidiaries conducts the Business or plans to conduct the Business during the Exclusion Period."

The two contracts further provided, in Section 20 of the contracts: "In the event of breach of any of the Executive's obligations under Section 8 or 9 above, the Company shall have the right to have such obligation specifically enforced by a court of competent jurisdiction, including, without limitation, the right to entry of restraining

orders and injunctions, whether preliminary, mandatory, temporary, or permanent, against a violation, threatened or actual, and whether or not continuing, of such obligation, without the necessity of showing any particular injury or damage, and without the posting of any bond or other security, it being acknowledged and agreed that any such breach or threatened breach would cause immediate and irreparable injury to the Company and that money damages alone would not provide an adequate remedy."

B. PETITION TO COMPEL ARBITRATION

Defendants petitioned to compel arbitration. Defendants asserted the two contracts included arbitration provisions. Defendants asserted that Gardner, RRM, and Yucaipa "engaged in extensive negotiations regarding the terms of [Gardner's Contract] over a period of more than a year, exchanging comments and proposed revisions back and forth. [Citation.] In addition, Mr. Gardner originally provided a proposed employment agreement to [Yucaipa] that contained an arbitration provision. [Citation.] While a different employment agreement was later used, Mr. Gardner and [Yucaipa] explicitly negotiated the arbitration provision in that agreement and Mr. Gardner proposed a couple of changes that were made based on his request. [Citation.] In addition, both Mr. Gardner and [Yucaipa] were represented by counsel with respect to these negotiations."

Defendants contended "Ms. Mederos and [Yucaipa] met to discuss the Mederos [Contract] before she signed it to discuss the terms of the agreement. [Citation.] Ms. Mederos made minor proposed changes to the Mederos [Contract], which were made,

and Ms. Mederos was given time to review the Mederos [Contract] before signing it." Defendants contended all of Employees' causes of action were covered by their respective contracts and therefore were subject to arbitration.

Defendants attached the declaration of Bruce Lipian to their petition. Lipian was chairman of RRM and Yucaipa. Lipian negotiated the terms for Employees' employment contracts on behalf of Yucaipa. Lipian explained that in April 2014 Gardner sent Lipian a draft employment agreement, which was based upon the agreement Gardner had with this employer at that time. In early 2015, Lipian sent Gardner a draft of another employment agreement. In April and May 2015, Lipian and Gardner "spoke and emailed numerous times regarding these agreements and [Gardner] requested certain changes to the agreements including modification of the non-compete definition."

During the negotiations, Lipian and Gardner discussed the arbitration provision. "Gardner proposed that the provision be modified such that Yucaipa was to bear all arbitrator fees and expenses in conjunction with the arbitration as opposed to having them split between Yucaipa and Mr. Gardner. In addition, Mr. Gardner inquired whether it was customary to include a provision in the arbitration policy that the prevailing party be entitled to an award of their attorneys' fees and costs incurred in connection with such arbitration. [Yucaipa and RRM] agreed to take [that] line out."

In regard to Mederos, Lipian met Mederos for dinner. At the dinner, Lipian "discussed the terms of the [employment contract] with her and [he] gave her time to review the [contract] and discuss [it] with an attorney if she wished." After that

meeting, "some changes were made to the [contract] in part based on requests for minor changes by Ms. Mederos." Lipian sent Mederos the final version of Mederos's contract on May 30, 2015, and told her she could contact him with any questions. Mederos signed her contract on June 2, 2015.

C. OPPOSITION

Employees opposed defendants' petition to compel arbitration. Employees asserted the two contracts were procedurally unconscionable because Yucaipa unilaterally drafted the arbitration provision and presented it to Employees "on a 'take it or leave it,' 'non-negotiable' basis. While Yucaipa was willing to make some minor modifications to the unconscionable/illegal arbitration provisions, they categorically refused to even negotiate the changes necessary to cure the unconscionability problems."

Employees asserted the two contracts were substantively unconscionable because the arbitration provision includes an exception for injunctions that applied only to defendants. The exception reads, "Notwithstanding the foregoing, this provision shall not preclude either party from seeking temporary, provisional, or injunctive relief from any court as provided in this Agreement." Employees asserted the "as provided in this Agreement" language caused the injunction exception to apply only to defendants. Employees explained that Section 20 (specific performance) set forth the only situation permitting an injunction.

Section 20 provides, in relevant part, "In the event of breach of any of the Executive's obligations under Sections 8 [(restrictive covenants, including the non-compete provision)] or 9 [(confidential records and intellectual property)] above, the Company shall have the right to have such obligation specifically enforced by a court of competent jurisdiction, including, without limitation the right to entry of restraining orders and injunctions, whether preliminary, mandatory, temporary, or permanent, against a violation."

Employees asserted that by reading the arbitration provision in combination with the specific performance provision, there was a one-sided exception for defendants to access the courts for injunctions. Employees contended, "Section 20 insulates [defendants] from a court challenge to the illegal non-compete provisions in Section 8 of the Employment Agreement, while preserving [defendants'] access to the courts whenever it so desires." Employees contended the type of lawsuit defendants were likely to bring under the two contracts would be one for an injunction for an alleged violation of the non-compete clause, and therefore, defendants preserved their right to access the courts while Employees' claims would be the type required to go to arbitration. Therefore, Employees contended the arbitration provision was one-sided and substantively unconscionable.

Employees attached the declaration of William S. Waldo to their opposition. Waldo was an employment law attorney. Waldo represented Gardner during Gardner's preemployment negotiations with Lipian. When Waldo reviewed the arbitration provision proposed by Lipian, Waldo "was struck by the unconscionability and

illegality" of the three clauses described *ante*. Waldo explained that "[o]ver the next several months, Mr. Gardner repeatedly told Lipian that he would not agree to the unconscionable/illegal provisions in the [arbitration], Specific Performance, and [non-compete] provisions that [Yucaipa was] demanding. [¶] Lipian categorically refused to make all of the changes required to remedy the unconscionable/illegal provisions in Paragraphs 18, 20, and 8, telling Mr. Gardner that they were 'non-negotiable,' 'deal points,' and would not be changed."

In May 2015, Waldo spoke to RRM's and Yucaipa's attorney, James Scheinkman. Waldo told Scheinkman that Sections 8, 18, and 20 of the proposed Gardner Contract were unconscionable or illegal. Scheinkman told Waldo "that a discussion on those issues would not be productive because RRM Holdings/Yucaipa and the investor group were not going to change them. [Waldo] told Mr. Scheinkman words to the effect of 'I think your client's position is a time bomb waiting to happen,' and [their] conversation ended. [¶] While Lipian/Yucaipa did agree to make the minor modifications to the [arbitration] provision Paragraph 18 to require that Yucaipa pay for the cost of an arbitration, that change did not remedy all of the unconscionability problems in the arbitration provisions."

Gardner's declaration was also attached to the opposition. Gardner asserted that during negotiations with Lipian, Gardner was "very concerned with the one-sided arbitration provision, how the Agreement limited [Gardner's] access to courts, and Yucaipa's ability to exempt itself from arbitration and sue [Gardner] in court to enforce the restrictive covenants against [him]."

Gardner told Lipian he "did not want an arbitration provision, nor restrictive covenants such as the non-compete in the Agreement. [¶] Lipian agreed only to one (1) minor change in the arbitration provision. Upon [Gardner's] suggestion, he changed the arbitration provision to shift the cost of arbitration onto the employer. [¶] Lipian categorically and repeatedly told [Gardner] that the arbitration provision, specific performance provision, and restrictive covenants, in Paragraphs 18, 20, and 8 of the Agreement, were 'non-negotiable,' were 'deal points,' and would not be changed. Lipian told [Gardner] that if [he] wanted to work for Yucaipa the Agreement was going to include the arbitration and non-compete provisions. [¶] On or about June 4, 2015, [Gardner] was presented with the final version of the [Gardner Contract], which [he] signed as a condition to [his] employment with Yucaipa, because Lipian and Yucaipa told [him] that it was 'take it or leave it' regarding the inclusion of the arbitration provision in the Agreement."

Mederos's declaration was also attached to the opposition. Mederos declared she negotiated the terms of her employment with Lipian prior to being hired. Mederos reviewed the initial employment contract on May 13, 2015.[1] Mederos "immediately became very concerned with the one-sided arbitration provision, how the Agreement limited [her] access to courts, and Yucaipa's ability to exempt itself from arbitration and sue [her] in court to enforce the restrictive covenants against her."

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[1] Mederos's declaration reflects she reviewed the proposed contract "on May 13, 2017." We infer this is an error and she reviewed the proposed contract on May 13, 2015.

At Mederos's request, Lipian met her for dinner on May 14. During the two-hour dinner, Mederos and Lipian "spent about 60% of [their] time discussing the non-compete [provision] of the Agreement, 30% discussing the arbitration provision, and 10% discussing the specific wording of the Agreement. [¶] [Mederos] was unsuccessful in [her] attempts to persuade Lipian to remove the arbitration and non-compete provisions. During dinner, Lipian insisted on the arbitration provisions and restrictive covenants and told [Mederos] that their inclusion in the Agreement was 'non-negotiable' and that they were 'deal points.' Lipian told [Mederos] that if [she] wanted to work for Yucaipa the Agreement was going to include the arbitration and non-compete provisions."

On May 30, Mederos "was presented with the final version of [Mederos's contract], which [she] signed as a condition to [her] employment with Yucaipa, because Lipian and Yucaipa told [her] that it was 'take it or leave it' regarding the inclusion of the arbitration provision in [Mederos's Contract]."

D. REPLY

Defendants filed a reply in support of their petition. Defendants asserted the two contracts were not procedurally unconscionable because the parties negotiated for months concerning the terms of the two contracts, including the arbitration provisions.

Defendants contended the two contracts were not substantively unconscionable because the arbitration provision and its injunction exception applied to Employees and defendants. In regard to the assertion that the arbitration provision was substantively unconscionable because it prevented Employees from challenging the non-compete

provision in court, defendants asserted Employees failed to support that argument with any citation to law.

E. RESPONSE

Employees filed a response to defendants' reply. Employees asserted the contract negotiations did not include Sections 8 (non-compete), 18 (arbitration), and 20 (specific performance). Employees contended that because defendants refused to negotiate the unconscionable provisions within Sections 8, 18, and 20, the contracts were procedurally unconscionable.

Employees contended the arbitration section was substantively unconscionable because it contained an exception for seeking injunctions in court "as provided in this Agreement." Employees contended the only situation described in the two contracts wherein one could seek an injunction was set forth in Section 20, which permitted defendants to seek injunctions for Employees' violations of the non-compete provision. Thus, Employees asserted the "as provided in this Agreement" language meant Employees could not seek an injunction in court, while defendants could seek an injunction in court.

In regard to defendants' assertion that Employees failed to cite law to support their argument that the arbitration provision is substantively unconscionable because Employees cannot challenge the non-compete clause in court, Employees responded, "The Fourth Appellate District in *Fitz v. NCR Corp.*, 118 Cal.App.4th 702 (2004) rejected the employer's contention that it had 'the necessary business justification for

excepting trade secret, non-competition, and intellectual property disputes from the [arbitration] policy.' "

F. HEARING

The trial court held a hearing on defendants' petition to compel arbitration. At the beginning of the hearing, the trial court explained that its tentative ruling was to deny the petition. The trial court tentatively believed the two contracts were unconscionable. The trial court explained that Lipian refused to negotiate the arbitration, specific performance, and non-compete provisions. Therefore, the trial court found there was procedural unconscionability. The trial court found the contracts were substantively unconscionable because defendants could seek injunctions in court while Employees did not have the same rights to access the courts.

Defendants asserted the two contracts were not procedurally unconscionable because the parties spent months negotiating the terms of the contracts and the terms of the contracts were modified as a result of the negotiations. Defendants contended the injunction exception to the arbitration provision was not substantively unconscionable because it permitted any party to seek an injunction in the courts. Defendants contended the contracts did not contain limits preventing Employees from seeking injunctions in the courts. Therefore, defendants asserted the injunction exception to the arbitration provision was not one-sided.

Employees asserted defendants refused to negotiate Sections 8 (non-compete), 18 (arbitration), and 20 (specific performance), and therefore the contracts were procedurally unconscionable. In regard to substantive unconscionability, Employees

contended that Section 20 set forth the only situation in which a party could seek an injunction, and it described defendants seeking an injunction against Employees for violating the non-compete section. Therefore, Employees asserted the exception to the arbitration provision, permitting both parties to seek injunctions in the courts " 'as provided in this Agreement' " was one-sided because only defendants could seek injunctions in court.

The trial court said, "I appreciate moving parties[']arguments. Frankly, I don't think that it's just the one provision that is causing me concern. The restrictive covenants that are set forth in Paragraph 8 have also caused me concern, as I have indicated. [¶] I find that there is both procedural and substantive unconscionability. And particularly since there's more than one provision in this agreement that causes me concern, I'm going to abide by the cautionary note given in the *Abramson* case . . . where it's not essentially the function of the Court to reform an agreement where there is more than one provision that the Court finds unfair either procedurally or substantively. It is within the exercise of the Court's discretion to decline to enforce the agreement at all. [¶] I think, frankly, that is the better approach in this instance, and that is certainly the approach I'm going to adopt, so I'm going to deny the motion in its entirety."

DISCUSSION

A. LAW AND STANDARD OF REVIEW

"To aid understanding of the issues in this case, we begin by discussing general principles of unconscionability. ' "One common formulation of unconscionability is

that it refers to ' "an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party." ' [Citation.] As that formulation implicitly recognizes, the doctrine of unconscionability has both a procedural and a substantive element, the former focusing on oppression or surprise due to unequal bargaining power, the latter on overly harsh or one-sided results." '

" ' "The prevailing view is that [procedural and substantive unconscionability] must *both* be present in order for a court to exercise its discretion to refuse to enforce a contract or clause under the doctrine of unconscionability." [Citation.] But they need not be present in the same degree. "Essentially a sliding scale is invoked which disregards the regularity of the procedural process of the contract formation, that creates the terms, in proportion to the greater harshness or unreasonableness of the substantive terms themselves." [Citations.] In other words, the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa.' [Citation.] Courts may find a contract as a whole 'or any clause of the contract' to be unconscionable." (*Sanchez v. Valencia Holding Co., LLC* (2015) 61 Cal.4th 899, 910.)

Unconscionability is a valid defense to a petition to compel arbitration. (*Sanchez v. Valencia Holding Co., LLC*, *supra*, 61 Cal.4th at p. 912.) The party raising the defense bears the burden of proof. (*Id.* at p. 911.) "Where, as here, the evidence is not in conflict, we review the trial court's denial of arbitration de novo." (*Pinnacle Museum Tower Assn. v. Pinnacle Market Development* (*US*), *LLC* (2012) 55 Cal.4th 223, 236.)

Employees assert there are evidentiary conflicts and we should apply the substantial evidence standard to those conflicts. In reviewing the record we conclude the trial court based its finding of unconscionability on evidence that was not in conflict. Accordingly, we will apply the de novo standard of review.

B. PROCEDURAL UNCONSCIONABILITY

Defendants contend the two contracts are not procedurally unconscionable.

" '[T]here are degrees of procedural unconscionability. At one end of the spectrum are contracts that have been freely negotiated by roughly equal parties, in which there is no procedural unconscionability . . . . Contracts of adhesion that involve surprise or other sharp practices lie on the other end of the spectrum." (*Baltazar v. Forever 21, Inc.* (2016) 62 Cal.4th 1237, 1244.) " 'The term [contract of adhesion] signifies a standardized contract, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it.' " (*Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 113.)

"Procedural unconscionability 'addresses the circumstances of contract negotiation and formation, focusing on oppression or surprise due to unequal bargaining power.' " (*Magno v. The College Network, Inc.* (2016) 1 Cal.App.5th 277, 284.) " ' " ' "Oppression occurs where a contract involves lack of negotiation and meaningful choice, surprise where the allegedly unconscionable provision is hidden within a prolix printed form." ' " ' " (*Id.* at p. 285.)

Gardner declared that he received a draft employment contract on March 24, 2015, and signed Gardner's Contract on June 4, 2015. Gardner further declared that he negotiated with Lipian concerning the terms of the contract. Through the course of the negotiations, Gardner successfully negotiated to have the costs for any arbitration shifted to defendants.

Gardner has described parties with relatively equal bargaining strength. Gardner and Lipian both negotiated, and Gardner was successful in some aspects of the negotiations. Thus, Lipian did not have a much stronger bargaining position. These were two people, with lawyers, who were negotiating the terms of the contract for months, and who both prevailed in different aspects of the negotiations. The facts reflect there was no procedural unconscionability because the parties had relatively equal bargaining power.

Mederos declared that she received a draft employment contract on May 13, 2015. Mederos met with Lipian on May 14 and had a two-hour conversation regarding the contract. Mederos requested changes to the contract, and Yucaipa agreed to some of those changes. On May 30, Mederos was presented with the final version of Mederos's contract, and she signed it on June 2. The evidence reflects Mederos had negotiating power equal to that of Lipian. Mederos spent two hours negotiating the terms of Mederos's Contract, and changes were made to the contract at her request. Thus, there was equal bargaining strength, and therefore, procedural unconscionability has not been demonstrated.

Employees contend there was procedural unconscionability because Lipian presented the arbitration and non-compete provisions "on a 'take it or leave it basis.' " Employees' assertion is not persuasive because Gardner was able to negotiate a change to the cost burden in the arbitration provision—shifting it to defendants. Thus, Gardner had successful negotiations concerning the arbitration provision. Thus, there was equal bargaining power.

To support their position that there was unequal bargaining power, the Employees cite *Abramson v. Juniper Networks, Inc.* (2004) 115 Cal.App.4th 638 (*Abramson*). In that case, the "plaintiff signed an offer letter and an employment agreement. Both contained arbitration provisions." (*Id.* at p. 644.) The *Abramson* defendants petitioned to compel arbitration based upon the arbitration provisions in the letter and employment agreement. (*Id.* at p. 645.) The plaintiff opposed the petition "arguing that the arbitration agreement was unconscionable and declaring that there had been no negotiation concerning arbitration, that he was surprised by its one-sided terms, and that the arbitration costs had not been explained to him." (*Ibid.*)

The *Abramson* defendants asserted the plaintiff had equal bargaining power because he received substantial concessions during the preemployment contract negotiation process. (*Abramson v. Juniper Networks, Inc.*, *supra*, 115 Cal.App.4th at p. 662.) The appellate court concluded that the plaintiff lacked bargaining power related to the arbitration provision because the arbitration provision was presented "on a take it or leave it basis." (*Id.* at p. 663.) Therefore, the appellate court found there was procedural unconscionability in relation to the arbitration provision. (*Ibid.*)

Contracts often involve each party giving something up in order to reach a deal. Parsing through contracts to find segments in which one party would not waiver is not how a procedural unconscionability analysis works. In most contracts, there will be certain provisions upon which one party refuses to waiver. For example, an employer may deny an employee permission to telecommute. The employer may refuse to waiver on that point. While many terms of the employment contract are negotiated and altered, that one anti-telecommuting provision remains. The anti-telecommuting provision will not be deemed procedurally unconscionable because the employer would not concede that single issue during negotiations. (See *Sonic-Calabasas A, Inc. v. Moreno* (2013) 57 Cal.4th 1109, 1146 ["As with any contract, the unconscionability inquiry requires a court to examine the *totality* of the agreement's substantive terms as well as the circumstances of its formation to determine whether the *overall* bargain was unreasonably one-sided," italics added].)

In other words, we are not persuaded by Employees' reliance on *Abramson*. In the instant case, defendants conceded that the arbitration costs could be shifted to defendants. However, defendants refused to make further alterations to the arbitration and non-compete provisions. A party's refusal to make further concessions does not mean the bargaining power of the parties was unequal. Parties are not required to make large concessions on every point sought during negotiations to demonstrate equal bargaining power.

The evidence presented by Employees reflects they negotiated with Lipian. Gardner was represented by counsel during the negotiations. As a result of Employees' requests, their respective contracts were modified. Thus, the bargaining process was not one-sided. Gardner, Mederos, and Lipian had equal bargaining power during their negotiations. Procedural unconscionability has not been demonstrated.

C. SUBSTANTIVE UNCONSCIONABILITY

The defendants contend the two contracts are not substantively unconscionable.

" 'Substantive unconscionability pertains to the fairness of an agreement's actual terms and to assessments of whether they are overly harsh or one-sided.' " (*Magno v. The College Network, Inc.*, *supra*, 1 Cal.App.5th at p. 284.) "A contract term is not substantively unconscionable when it merely gives one side a greater benefit; rather, the term must be 'so one-sided as to "shock the conscience." ' " (*Pinnacle Museum Tower Assn. v. Pinnacle Market Development* (*US*), *LLC*, *supra*, 55 Cal.4th at p. 246.)

The first clause that the trial court found to be substantively unconscionable is the exception in the Section 18 arbitration provision that permits either party to seek an injunction. Within the two contracts' arbitration provision there is an exception that provides, "Notwithstanding the foregoing, this provision shall not preclude either party from seeking temporary, provisional, or injunctive relief from any court as provided in this Agreement."

The foregoing clause is not one-sided because it permits either party to seek an injunction. Notably, Employees are seeking an injunction in the instant lawsuit. Specifically, Employees are requesting an injunction forbidding defendants from

forcing employees to agree to illegal contract terms. Because the ability to seek an injunction in court applies to both parties, the clause is not substantively one-sided.

Employees assert the injunction exception is one-sided because the "as provided in this Agreement" phrase limits the reach of the injunction exception to those situations provided for in the two contracts. Employees contend there is only one section, Section 20, that permits seeking an injunction and it only allows defendants to seek an injunction for Employees' alleged violations of the non-compete provision. Therefore, Employees contend, per the two contracts, only defendants are permitted to obtain injunctive relief in court.

We do not read the "as provided in this Agreement" language as narrowly as Employees. We see no limits in the contracts regarding in what situations one may seek an injunction. We see one situation wherein an injunction would be expressly permitted—a violation of the non-compete provision. We read the two contracts in a broader manner than Employees because the "as provided in this Agreement" language is ambiguous. One could read it narrowly, as permitting a party to seek an injunction only as set forth in the two contracts; or one could read it broadly, as permitting a party to seek an injunction except as limited by the two contracts. Because the contract language is unclear, we construe it against the drafter, i.e., defendants, and read the provision broadly so that it favors Employees. (Civ. Code, § 1654; *Sandquist v. Lebo Automotive, Inc.* (2016) 1 Cal.5th 233, 247-248.) Thus, in our reading of the two contracts, Employees may access the courts for injunctive relief related to the two contracts.

Nevertheless, to the extent one reads the "as provided in this Agreement" language as permitting one to seek an injunction only in the situations specified in the two contracts, then Employees could exercise a statutory right to seek an injunction. Code of Civil Procedure section 1281.8, subdivision (b), provides, in relevant part: "A party to an arbitration agreement may file in the court in the county in which an arbitration proceeding is pending, or if an arbitration proceeding has not commenced, in any proper court, an application for a provisional remedy in connection with an arbitrable controversy, but only upon the ground that the award to which the applicant may be entitled may be rendered ineffectual without provision relief."

The statutory right provided to Employees is similar to the contractual right provided to defendants, under Employees' narrow reading of the two contracts. Under Employees' narrow reading of the two contracts, only defendants may seek an injunction for Employees' alleged violation of the non-compete provision. If defendants want damages for an alleged violation of the non-compete provision, then defendants would have to arbitrate. The same rule applies to Employees. If Employees want damages, then they have to arbitrate, but if Employees need a provisional remedy pending the outcome of the arbitration, then they can go to court to obtain that provisional relief. In sum, the injunction exception is not unduly harsh or overly one-sided. Therefore, it is not substantively unconscionable.

Employees contend that Section 20 (specific performance) grants defendants greater injunction rights than Employees have under Code of Civil Procedure section 1281.8 and therefore the arbitration provision is substantively unconscionable.

Employees may be correct that defendants have some greater rights under the two contracts, but the point is that the arbitration provision and its injunction exception are not one-sided. A contract is not required to be perfectly symmetrical in order to escape substantive unconscionability. Rather, in order to escape substantive unconscionability, the contract must have "a ' "modicum of bilaterality" ' in the arbitration remedy." (*Flores v. Transamerica HomeFirst, Inc.* (2001) 93 Cal.App.4th 846, 854.) There is some mutuality in the arbitration provision and its injunction exception, even when the provision is read as narrowly as it is read by Employees. Therefore, substantive unconscionability has not been demonstrated.

Next, defendants assert that, in the trial court, Employees' failed to provide meaningful legal analysis to support their assertion that the arbitration provision is substantively unconscionable because it prevents Employees from challenging the non-compete provision in court. We agree that Employees failed to provide meaningful legal analysis on this topic in the trial court. In Employees' opposition, within their substantive unconscionability argument, they wrote, "Section 20 insulates [defendants] from a court challenge to the illegal non-compete provisions in Section 8 of the Employment Agreement, while preserving [defendants'] access to the courts whenever it so desires."

We understand Employee's argument as asserting that defendants can access the courts regarding the non-compete provision, while Employees must arbitrate any issue related to the non-compete provision. To the extent that is the Employees' assertion, we find it unpersuasive for two reasons. First, if defendants seek an injunction in the trial

court relating to the non-compete provision, then Employees will have obtained their opportunity, in court, to litigate the enforceability of the non-compete provision. Second, Employees can also access the courts for injunctions. As explained *ante*, under a broad reading of the two contracts or under Code of Civil Procedure section 1281.8, Employees can seek injunctive relief in the courts. Thus, if Employees need an injunction related to the non-compete provision, then they can also access the courts. Accordingly, we are not persuaded that the possibility of having to arbitrate the enforceability of the non-compete provision renders the arbitration provision one-sided.

Employees assert the restrictive covenants in Section 8 of the two contracts, which includes the non-compete provision, are unconscionable. In this case we are examining whether Employees should be compelled to arbitrate their dispute. Therefore, we have no basis to examine alleged substantive unconscionability unrelated to the arbitration provision. It is for an arbitrator to decide whether the restrictive covenants are unenforceable due to being unconscionable. (See *SingerLewak LLP v. Gantman* (2015) 241 Cal.App.4th 610, 613 ["The arbitrator determined a non-compete agreement . . . was enforceable"].)

D. CONCLUSION

We have concluded that procedural and substantive unconscionability were not demonstrated. Therefore, the trial court erred by finding the arbitration provision to be unconscionable. To be clear, our review has been limited to the unconscionability of the arbitration provision; we express no view on whether arbitration should be denied for other reasons. (See e.g., *Correia v. NB Baker Electric, Inc.* (2019) 32 Cal.App.5th

602, 621 [“courts have uniformly held that an employee’s predispute agreement to arbitrate PAGA claims is not enforceable without the state’s consent”].)

DISPOSITION

The order is reversed. Appellants are awarded their costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1).)

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

MILLER
J.

We concur:

RAMIREZ
P. J.

CODRINGTON
J.